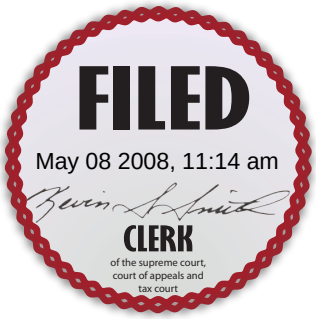

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IN THE
COURT OF APPEALS OF INDIANA

COMMISSIONER, INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 45A03-0706-CV-256
BULK PETROLEUM CORPORATION,	)	
Appellee-Defendant.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable John R. Pera, Judge
Cause No. 45D10-0612-PL-159

May 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Indiana Department of Environmental Management ("IDEM") brings this interlocutory appeal of the trial court's denial of its motion for preliminary injunction. We affirm.

Issue

Whether the trial court erred in denying IDEM's motion for preliminary injunction.

Facts and Procedural History

Bulk Petroleum Corporation ("Bulk Petr.") is the current owner of the Marathon EZ-Go gas station ("the Site") in Crown Point, Indiana. The Site has been a gasoline station since the 1960s. In May of 1997, four 6000-gallon underground storage tanks ("USTs") were removed from the Site and were replaced with new USTs. After the removal and upgrade of the USTs, petroleum hydrocarbons, benzene, toluene, ethyl benzene, xylene and MTBE (gasoline constituents) were discovered in the soil and groundwater, indicating contamination, both on the Site as well as off-site. The release of contaminants was reported to IDEM, and the Site was assigned an Incident Number and a low priority. Since 1997, there has been no evidence of any other release or spill of petroleum at the Site.

Between 1998 and 2003, Bulk Petr. contracted to have environmental tests performed and submitted the various environmental reports to IDEM. On March 30, 2005, Bulk Petr. submitted to IDEM a revised Further Investigation Report and Corrective Action Plan ("CAP"). A CAP is a plan describing the methods and equipment to be implemented by a property owner to mitigate the hazard of and remediate contaminated soil and groundwater. On May 16, 2005, IDEM approved the CAP. Bulk Petr. hired Superior Environmental

("Superior") to implement the CAP. Superior installed the remediation system, which became operational for a short period in early 2006. According to Bulk Petr., Superior removed components from the remediation system due to a dispute over non-payment by Bulk. This alleged sabotage of the system made it inoperable.

Bulk Petr. hired American Environmental Corporation ("AEC") to assess the damage and determine the work needed to fix the system. The remediation system is still inoperable.

On December 11, 2006, IDEM filed a complaint seeking a preliminary and permanent injunction to enjoin Bulk Petr. "from further violation of IDEM's statutes and rules concerning corrective action to remediate soil and groundwater contamination." After holding a hearing on the preliminary injunction, the trial court denied the petition. The trial court found that the gasoline contamination from the 1997 leak was still present on the Site and that it had spread to the west, under and across State Route 55 and onto neighboring property. The order included a conclusion that Bulk Petr. was not in compliance with Indiana Administrative Code title 329, section 9-5-7(c), which reads, in part: "Upon approval of the corrective action plan . . ., the owner and operator shall implement the [CAP]." The trial court also concluded that IDEM had demonstrated all of the requirements for a preliminary injunction, save the irreparable harm requirement: "IDEM has not shown, however that irreparable harm would result if the injunction is not granted, as IDEM presented no evidence of vapor intrusion into nearby homes or drinking water contamination." Appellant's App. at 107.

IDEM now appeals.

Discussion and Decision

I. Standard of Review

The grant or denial of a preliminary injunction rests within the sound discretion of the trial court. Ind. Fam. and Soc. Serv. Admin. v. Walgreen Co., 769 N.E.2d 158, 161 (Ind. 2002). Appellate review is limited to whether there was a clear abuse of that discretion. Id. When determining whether or not to grant a preliminary injunction, the trial court is required to make special findings of fact and state its conclusions thereon. Ind. Trial Rule 52(A). When findings and conclusions are made, the reviewing court must determine if the trial court's findings support the judgment. Barlow v. Sipes, 744 N.E.2d 1, 5 (Ind. Ct. App. 2001), trans. denied. The trial court's judgment will be reversed only when clearly erroneous. Id. Findings of fact are clearly erroneous when the record lacks evidence or reasonable inferences from the evidence to support them. Id. We consider the evidence only in the light most favorable to the judgment and construe findings together liberally in favor of the judgment. Id.

To obtain a preliminary injunction, the moving party has the burden of demonstrating by a preponderance of the evidence that:

> (1) the movant's remedies at law were inadequate, causing irreparable harm pending resolution of the substantive action; (2) the movant had at least a reasonable likelihood of success at trial by establishing a *prima facie* case; (3) the threatened injury to the movant outweighed the potential harm to the defendant; and (4) the public interest would not be disserved.

Ind. Fam. and Soc. Serv. Admin, 769 N.E.2d at 161. The power to issue a preliminary injunction should be used sparingly, and such power should not be used except in rare instances in which the law and facts are clearly within the moving party's favor. Planned Parenthood of Ind. v. Carter, 854 N.E.2d 853, 863 (Ind. Ct. App. 2006).

II. Analysis

The trial court concluded that the evidence fulfilled all of the requirements for a preliminary injunction except for a showing of irreparable harm. On appeal, IDEM argues that the trial court erred in reaching this conclusion, because the trial court should have used the *per se* rule, which when invoked satisfies the irreparable harm requirement regardless of whether the plaintiff has actually suffered irreparable harm.

Our Supreme Court has explained that a relaxed standard, referred to as the "per se rule," may sometimes be applied for clear, uncontested unlawful conduct. Ind. Fam. and Soc. Serv. Admin., 769 N.E.2d at 162. However, it emphasized that because this would relieve a moving party of demonstrating several of the injunctive relief requirements, this relaxed standard is only appropriate when it is clear that a statute has been violated. Id. "[W]here the action to be enjoined is unlawful, the unlawful act constitutes *per se* 'irreparable harm' for purposes of the preliminary injunction analysis." Planned Parenthood of Ind., 854 N.E.2d at 864 (quoting Short On Cash.Net of New Castle, Inc. v. Dep't of Fin. Insts., 811 N.E.2d 819, 823 (Ind. Ct. App. 2004)). When the *per se* rule is applicable, the moving party is relieved of demonstrating irreparable harm and that the balance of hardship is in his favor. Id. (quoting L.E. Servs. Inc. v. State Lottery Comm'n of Ind., 646 N.E.2d 334, 349 (Ind. Ct. App. 1995), trans. denied).

IDEM contends that Bulk Petr. was clearly in violation of the law, specifically Indiana Code Section 13-30-2-1 and Indiana Administrative Code title 329, section 9-5-7(c). From

IDEM's brief, it is not clear whether it bases its argument on a violation of subsection 1[1] or subsection 3[2] of Indiana Code Section 13-30-2-1. Its argument cites subsection 1, yet proceeds to quote the language of subsection 3. Regardless upon which section the argument is based, the facts are clear that the gasoline discharge is historical and not continuous. Both subsections employ present tense verbs yet the actions of Bulk Petr. that resulted in the discharge occurred over ten years ago. Furthermore, IDEM's request is not based on the occurrence of the decade old release of gasoline. Rather, it is Bulk Petr.'s failure to timely implement the agreed plan to clean up the contaminants from the one time discharge. Therefore, Bulk Petr.'s failure to implement the CAP is not a violation of Indiana Code Section 13-30-2-1.

In support of its argument for the application of the *per se* rule, IDEM also points to the trial court's conclusion that Bulk Petr. is not in compliance with Indiana Administrative Code title 329, section 9-5-7(c) in that it has failed to consistently implement the CAP. This administrative rule provides in relevant part that "[u]pon approval of the corrective action plan or as directed by the commissioner, the owner and operator shall implement the plan, including all modifications to the plan made by the commissioner." 329 IAC 9-5-7(c). This

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[1] "A person may not do any of the following:
(1) Discharge, emit, cause, allow, or threaten to discharge, emit, cause, or allow any contaminant or waste, including any noxious odor, either alone or in combination with contaminants from other sources, into:
(A) the environment; or
(B) any publicly owned treatment works;
in any form that causes or would cause pollution that violates or would violate rules, standards, or discharge or emission requirements adopted by the appropriate board under the environmental management laws." Ind. Code § 13-30-2-1(1).

[2] "A person may not do any of the following: . . . . (3) Deposit any contaminants upon the land in a place and manner that creates or would create a pollution hazard that violates or would violate a rule adopted by one (1) of the boards."

rule requires the implementation of the CAP, but does not specify a deadline or timeline by which the responsible owner must begin or complete the remediation. Rather, the CAP itself is the source of the agreed completion dates. See 329 IAC 9-5-7(f)(1)(J)(iv). The basis of IDEM's complaint is that Bulk Petr. has failed to "continually operate the required remediation system," not the failure of implementation all together. Appellant's Appendix at 12. We do not believe these circumstances are those of clear, uncontested unlawful conduct necessitating the application of the *per se* rule, but rather the breach of an agreement as expressed in the Further Investigation Report and Corrective Action Plan. The *per se* rule has no application in this case. Therefore, IDEM was required to demonstrate irreparable harm in order to obtain the requested preliminary injunction. The trial court did not err in denying the petition.

Affirmed.

NAJAM, J., and CRONE, J., concur.

Ind. Code § 13-30-2-1(3).